Eri Limited v Equitorial Commercial Bank Formerly Southern Credit Bank Corporation Ltd & another (Civil Appeal 122 of 2017) [2023] KECA 730 (KLR) (9 June 2023) (Judgment)

Neutral citation: [2023] KECA 730 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 122 OF 2017

PO KIAGE, F TUIYOTT & AO MUCHELULE, JJA

JUNE 9, 2023

BETWEEN

ERI LIMITED ..... APPELLANT

AND

EQUITORIAL COMMERCIAL BANK FORMERLY SOUTHERN CREDIT BANK CORPORATION LTD ..... 1ST RESPONDENT

ZAINUL GALIB VELJI ..... 2ND RESPONDENT

(An appeal from the ruling of the ELC Court at Kisumu (Kaniaru, J.) dated 8th September, 2016 In ELC No. 269 of 2017 (formerly HCCC No. 120 of 2010)

JUDGMENT

1. Some time in 1998, the appellant, Eri Limited was offered some overdraft facility by the 1st respondent, Equitorial Commercial Bank (formerly Southern Credit Banking Corporation Ltd) amounting to Kshs.18,000,000 but enhanced later to Kshs.20,000,000. The facility was secured by a charge that was registered against the appellant's properties Kisumu Municipality/Block 12/265 and Kisumu Municipality/Block 3/92. Repayment by the appellant was to be in accordance with the pre-agreed terms and conditions. It is common ground that the appellant was unable to service the facility which led to the issuance of a statutory notice of sale by the 1st respondent. The notice was issued on 5th September 2001.

2. In response to the statutory notice of sale, the appellant filed HCCC No. 594 of 2002 at Milimani seeking to restrain the 1st respondent from selling the properties. On 25th June 2002 an interlocutory application for injunction filed in the suit was dismissed. Following the dismissal of the appellant's application, it applied to this Court for stay of execution under Rule 5(2)(b) of the *Court of Appeal Rules*. The application was dismissed with costs on 19th December 2003. This was in Civil Application No. NAI 196 of 2002.

3. Following the court's refusal to stop the sale of the suit properties, the 1st respondent went ahead and exercised its statutory power of sale. A public auction was held and the properties were bought by the 2nd respondent Zainul Galib Velji at Kshs.8,000,000. The 2nd respondent obtained registration to the properties. On 12th October 2005, HCCC No. 594 of 2002 at Milimani was dismissed for want of prosecution.

4. The appellant handed over possession to the 2nd respondent of Kisumu Municipality/Block 12/265, but refused to hand over Kisumu Municipality/Block 3/92, despite requests. The 2nd respondent sued the appellant in HCCC No. 143 of 2004 at Kisumu seeking vacant possession, general damages for trespass and mesne profits. The appellant filed a defence and counterclaim. It alleged that the property was illegally transferred to the 2nd respondent by the 1st respondent on 17th November 2003 in defiance of an order issued by the Court of Appeal on 1st August 2002 in Civil Application No. NAI 196 of 2001 to the knowledge of the 2nd respondent. Secondly, that the purported exercise of statutory power of sale and the sale of the same property had been challenged in HCCC No. 594 of 2002 at Milimani, and therefore that the bank had no statutory power of sale to exercise and accordingly it could not pass any title to the 2nd respondent over the suit property. Consequently, it was pleaded, the appellant was entitled to occupation under the provisions of section 30(g) of the *Registered Land Act* (Cap. 300). By reason of the counterclaim the appellant sought declaratory orders that the 1st respondent did not have a statutory power of sale over the suit property; the purported transfer was illegal, null and void; the change of registered owner effected on 24th December 2004 was null and void; and damages.

5. The 2nd respondent filed a defence to the counterclaim, denying the claims of the appellant. His case was that the purchase took place following a public auction; that he paid valuable consideration for the property; and that he was unaware of any omission, fraud or mistake, if at all, that may have been occasioned at the time of or subsequent to the registration of the property, and therefore he was protected by section 134 of the *Registered Land Act*. By chamber summons dated 2nd September 2010, the 2nd respondent applied to have the defence struck out, and, in the alternative, to have the defence and counterclaim struck so that the matter could go to formal proof.

6. On 1st August 2011 the High Court delivered a ruling allowing the chamber application. The court stated that the rights of the 2nd respondent had been solidified by the provisions of sections 28 and 77 of the *Registered Land Act*, and could not be defeated by the rights of the appellant which, though asserted under section 30(g) of the *Act*, had nonetheless been overtaken by section 77 of the Act; that once the bank was not a party to the proceedings there was no direct contractual link between the appellant and the 2nd respondent that could form the basis of the counterclaim; and that, in any case, the contract between the appellant and the bank involved two properties and, following the public auction in which the 2nd respondent had bought the properties, the appellant had surrendered one to the 2nd respondent.

7. The appellant was aggrieved by the decision. It came to this Court in Civil Application No. NAI. 209 of 2011 seeking stay of execution and stay of further proceedings under Rule 5(2)(b) of the *Court of Appeal Rules*. This Court heard the application, and on 22nd March 2012 found that the intended appeal was not arguable and that, even if it were to succeed, it would not be rendered nugatory. In dismissing the application, the Court noted as follows:-

> " It would appear from the record before us that the applicant received and utilised the credit facilities and defaulted in repayment. The suit property was sold by public auction which the applicant claims to be tainted with fraud. But the decision of this court in *Mbuthia v*

Jimba Credit Finance Corporation & another [1988] KLR 1 does not support the applicant's case; since the equity of redemption could have been lost on the fall of the hammer.

In view of the decision in *Mbuthia's case* (*supra*) and the provisions of *Registered Land Act* (Cap. 300 Laws of Kenya) it would appear that damages would in the circumstances suffice."

8. In Kisumu Constitutional Petition No. 4 of 2012 the appellant's principal director Rasik Lavji Sanghrajka sought declaratory orders that the proceedings in HCCC No. 143 of 2004 at Kisumu were inconsistent with its constitutionally guaranteed right to fair hearing under Articles 50(1) and (4) and 160(1) of the *Constitution*. A ruling was delivered on 21st December 2012 dismissing the petition. It was found that the litigants in HCCC No. 143 of 2004 at Kisumu had been accorded a fair hearing, and that no constitutional issues had arisen in the matter.

9. The present appeal relates to Kisumu ELC No. 269 of 2017 (formerly HCCC No. 120 of 2010 at Kisumu). By way of an amended plaint, the appellant alleged fraud and illegality regarding the sale and transfer of the suit property Kisumu Municipality/Block 12/265 on the ground that the alleged sale was by private treaty and not by public auction. The court was asked to declare that the property was not validly sold to the 2nd respondent by the 1st respondent, and that the transfer and registration of the suit property to the 2nd respondent was thus fraudulent, null and void. An order was sought to rectify the register by cancelling the 2nd respondent's transfer as the registered proprietor and substituting it with the appellant's name. With the suit was a notice of motion seeking, in the interim, inhibition and restraining orders against the respondents who were required not to deal with the property until the suit was heard and determined.

10. In opposition to the suit, the respondents filed two applications; one dated 23rd September 2013 and the other dated 22nd October 2013, primarily seeking to strike out the suit on the grounds of res judicata as the issues raised in the suit were directly and substantially in issue in HCCC No. 594 of 2002 at Milimani and HCCC No. 143 of 2004 at Kisumu, and, secondly, that the suit was statute barred as it related to a contract and ought to have been filed within six (6) years which time had elapsed, the cause of action having arisen in 2002.

11. The appellant's response was that the suit was for the recovery of land, and that the applicable period pursuant to section 7 of the *Limitation of Actions Act* was twelve years; that the suit was originally filed in 2010 and was thus within the twelve (12)years. Lastly, it was the appellant's contention that the suit was not barred as time in fraud starts to run from the time the fraud is discovered. On the crucial issue of *res-judicata*, the appellant's case was that the issues in HCCC No. 594 of 2002 at Milimani and those in the instant case were different; that the issue in the instant suit was whether the purported sale of the suit property to the 2nd respondent was null and void owing to manifest fraud and/or illegality. Whereas in HCCC No. 594 of 2002 no sale had occurred. It was stated that the prayers in the two cases were different. Concerning HCCC No. 143 of 2004 at Kisumu in which the appellant's counterclaim was dismissed, it was pointed out that the applications leading to the dismissal were brought in bad faith, and that, in any case, the 1st respondent was not a party to the suit. Lastly, the appellant's case before the trial court was that the issues in HCCC No. 594 of 2002 at Milimani were not heard and determined on merits.

12. The applications were heard by A.K. Kaniaru, J of the Environment and Land Court at Kisumu. On 8th September 2016 he agreed with the respondents and struck out the suit with costs. He found that the suit was founded on contract, and that under section 4 of the *Limitation of Actions Act* it ought to have been brought within six (6) years, starting to count from the year 2002 when the cause of action arose. When the suit was filed in 2010, he found, time had run out.

13. On the question of res judicata, the learned judge traced the history of the disputes and observed that the appellant had charged the two properties together. When it defaulted in payment the two properties were advertised for sale. They were eventually sold at the same time to the 2nd respondent, and registered in his name. The appellant voluntarily handed one parcel, Kisumu Municipality/Block 12/265 to the 2nd respondent, and refused with the other, Kisumu Municipality/Block 3/92. It was noted that in HCCC No. 143 of 2004 at Kisumu, the 2nd respondent had sued the appellant for vacant possession of Kisumu Municipality/Block 3/92. The appellant filed a defence and counterclaim. In the counterclaim he attacked the legality of the sale and subsequent transfer of the sale to the 2nd respondent. In striking out the counterclaim, the High Court found that it raised no reasonable cause of action and was frivolous, vexatious and an abuse of the process of the court. The High Court observed that the issue of challenge to the validity of the sale and transfer of the said property ought to have been done in HCCC No. 594 of 2002 at Milimani and Civil Appeal No. 264 of 2002 but had not been. The two matters were then still pending. Lastly, it was noted that the High Court had stated as follows:-

> " The only live issue in this matter is therefore whether in the circumstances the applicant was proper to exercise its statutory power of sale. And in my view that issue was implicitly resolved in favour of the applicant both in the High Court and the Court of Appeal. The question that follows is whether in those circumstances the present respondent can institute a fresh suit to challenge the issues lost in HCCC No. 594 of 2002 and Civil Appeal No. 264 and in which are still arguable in the final determination in those suits. Both courts refused to grant an interim injunction to stop any sale of the suit properties. The validity of the alleged sale which took place can still be challenged in those matters pending by the respondent. There is no new factual situation created by the present plaintiff in seeking vacant possession of the suit property as a purchaser for value. It is significant to state that the present respondent was aware that a sale and subsequent transfer had taken place but had to wait for the present plaintiff's suit and in response file a counterclaim, and join the bank "

14. The learned Judge then found that the issue of sale could not be revisited as it had been settled in the decisions relating to the dispute. He stated as follows:-

> " That is the same sale that the plaintiff in this case wants the court to declare illegal. He would like the court to revisit the issue of the statutory notice of sale, the sale itself and the transfer that took place. The fact of the matter is that this court cannot revisit issues which have been the subject of findings by fellow judges of equal or concurrent jurisdiction."

15. The appellant was aggrieved by the ruling and orders therein and filed this appeal whose grounds are as follows:-

> " 1) The Learned Judge of the High Court erred in both law and facts in finding that the suit was res - judicata.
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> 2) The Learned Judge failed to evaluate the evidence adduced before him on the basis of its strength.
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> 3) The Learned Judge erred in both law and facts in considering contradictory affidavit by both defendants on issues of mandatory requirement that the properties were only to be sold by public auction and not private treaty.

4) The Learned Judge erred in law and fact in failing to find that the 2nd defendant committed perjury.

5) Further the Learned Judge erred in both law and fact to find the suit was purely on recovery of land and not based on contract.

6) That the Learned Judge of the High Court misdirected himself in law by failing to appreciate that the 1st defendant (in the affidavit of Brian Asin) had misled the court on factual issues that the suit property was sold by public auction and transferred to the 2nd defendant.

7) The Learned Judge erred in law and fact by not expunging supporting affidavit dated 18th September 2013 by the 2nd defendant which was filed but not paid for and more importantly the 2nd defendant confirms that she only attended the auction and was informed 2 days later that her offer was accepted."

16. M/s Amondi for the appellant, Mr. Akenga for the 1st respondent and Mr. Otieno for the 2nd respondent each filed written submissions on the appeal, and each relied on the submissions. The appeal was urged around two substantial issues. The first issue was whether the trial court correctly found that the suit was res judicata, and the second issue was whether the suit was for the recovery of land and therefore was not barred by dint of section 7 of the *Limitation of Actions Act* or whether it was based on contract under section 4 of the *Act* and therefore that the learned Judge was correct in finding that the same was statute barred having been filed after the expiry of six (6) years. There were evidential issues that were raised in the grounds of appeal, but since the suit was determined on these jurisdictional issues, we have not found it appropriate to deal with them.

17. In her submissions counsel for the appellant was of the considered view that HCCC No. 594 of 2002 at Milimani sought to challenge the statutory notice of sale while the suit giving rise to this appeal sought the recovery of Kisumu/Municipality/Block 12/265, pleading fraud and illegality regarding the sale and transfer of the property. It was alleging, among other things, that the sale was by private treaty and not by public auction. Counsel submitted that the two issues were wholly different. The second contention was that HCCC No. 594 of 2002 at Milimani was not determined on merits, but was dismissed for want of prosecution. Therefore, she urged, res judicata would not arise as its rights in regard to the land had not been determined. Reference was made to the decision in *Enock Kirao Muhanji v Hamid Abdalia Mbarak* [2013]eKLR.

18. On the question of limitation, it was counsel's submission that the instant suit was not statute barred as it sought the recovery of land which had been allegedly sold and transferred in the year 2002; that the prescribed period was twelve (12) years. This suit having been filed in 2010, had been brought within the prescribed period. She submitted that the learned Judge had erred in finding that the cause of action was based on contract.

19. The learned counsel for the respondents submitted that the principle of res judicata required that parties to litigation should bring forward their whole case. They contended that the issues raised in HCCC No. 594 of 2002 at Milimani and Civil Appeal No. NAI 196 of 2002 were the same ones as those in the instant suit; that the rights of the parties, including the appellant, had been determined in the two cases, and therefore that the present suit was correctly determined to be *res-judicata*. Reference was made to the decision in *Kenya Commercial Bank Ltd v Benjoh Amalgamated Ltd*, Civil Appeal No. 107 of 2010 as consolidated with Appeal Nos. 137 of 2010 and 174 of 2010.

20. On the second issue, counsel agreed with the learned Judge that the relationship between the appellant and the 1st respondent was purely contractual, and that the two parcels of land had been disposed of by the 1st respondent to the 2nd respondent in furtherance of that contract; and that, therefore, the cause of action was not in regard to the recovery of land. That being the case, it was submitted, the suit had been brought outside section 4 of the *Limitation of Actions Act*, and therefore was barred by limitation.

21. We have anxiously considered the evidence that was before the trial court, the grounds of appeal and the submissions of the learned counsel on either side. We are alive to the duty of this first appellate court. Its duty is to subject the whole of the evidence to a fresh and exhaustive scrutiny and consideration and make our own conclusions thereon, bearing in mind that, if there were witnesses called by the trial court, it had no opportunity of seeing and hearing them. This duty was ably stated in *Selle & Another v Associated Motor Boat Company Ltd & Others* [1968]EA 123. In this dispute, however, we are called upon to reconsider and review the grounds upon which the superior court proceeded to strike out the appellant's suit, so that we can arrive at our own conclusions on the matter.

22. In all the cases that have been between the appellant, on one side, and the respondents, on the other, the common thread is as follows. The appellant was offered an overdraft facility by the 1st respondent of up to Kshs.20,000,000. It utilised the credit facility but defaulted in repayment. The appellant had offered its properties Kisumu Municipality/Block 12/165 and Kisumu Municipality/Block 3/92 as security, and a charge was registered against them. When there was no payment, the 1st respondent sought to exercise its right under the charge and issued a statutory notice of sale. The appellant unsuccessfully challenged the statutory notice in HCCC No. 594 of 2002 at Milimani and in Civil Appeal No. NAI 196 of 2002. The sale proceeded by way of public auction, and the 2nd respondent bought the two properties. The two properties were eventually registered in his name. In the counterclaim in HCCC No. 143 of 2004 at Kisumu, the appellant challenged the statutory notice, sale and transfer, saying that they had been fraudulent and illegal and could not have been the basis of the 2nd respondent's title to Kisumu Municipality/Block 3/92. The High Court heard the chamber application that had been brought by the 2nd respondent to have the counterclaim struck out on the basis that it was frivolous and an abuse of the process of the court, and that if the appellant had any remedy, it lay in damages and not in the recovery of land. The court agreed with the 2nd respondent and the counterclaim was struck out. The appellant came to the Court of Appeal, but its application seeking stay of execution and stay of the proceedings was on 22nd March 2012 dismissed with costs. The Court found that the intended appeal by the appellant did not raise any arguable grounds. It expressed the view that the appellant's equity of redemption was lost on the fall of the hammer, and that all that it could claim were damages. There is no evidence that the appellant proceeded to appeal and got a different result.

23. There is no dispute that the 2nd respondent bought both Kisumu Municipality/Block 12/165 and Kisumu Municipality/Block 3/92. They belonged to the appellant. The purchase followed the same public auction. The respondent got each transferred to him. The appellant voluntarily handed over Kisumu Municipality/Block 12/265 to the 2nd respondent, and refused with Kisumu Municipality/Block 3/92. The 2nd respondent sued it in HCCC No. 143 of 2004 at Kisumu. It is in that suit that the appellant's counterclaim was struck out. The instant suit was in respect of Kisumu Municipality/Block 12/265.

24. The doctrine of *res-judicata* is contained in section 7 of the *Civil Procedure Act* which states as follows:-

> " No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court

competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

25. The Supreme Court in *Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another*, Motion No. 42 of 2014 stated the following regarding *res-judicata*:

> " 52. Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights.....
>
> 53. .....
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> 54. The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to Court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the Courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively."

26. Courts in Kenya have accepted the well-known decision of Wigram V.C. in *Henderson v Henderson* [1843] 3 Hare 100 at page 115 where he stated as follows:-

> "....where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by parties to form an opinion and pronounce a Judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time....."

27. The appellant, in our considered view, has intentionally been litigating in instalments. When it filed HCCC No. 594 of 2002 at Milimani, it sought to stop the sale of the two parcels of land. It failed there, and failed in the Court of Appeal. In HCCC No. 143 of 2004, it filed a counterclaim to claim Kisumu Municipality/Block 3/92 on the basis that, among other things, the property had been illegally transferred to the 2nd respondent. The counterclaim was struck out. It tried this Court and lost. The counterclaim was, in essence, found to contain no reasonable cause of action. In the matter subject of this appeal, the appellant sought the retransfer of Kisumu Municipality/Block 12/265 to it on the basis that the same had been fraudulently and illegally transferred to the 2nd respondent in a tainted sale. The learned judge found, correctly in our view, that the appellant was relitigating a matter that had been determined by the previous courts. This same issue had been found in HCCC No. 143 of 2004 at Kisumu to be frivolous and an abuse of the process of the court. We consequently return the verdict that the learned judge did not err when he found that the present suit was res- judicata. The same reasons that were used by the High Court to strike out the counterclaim in HCCC No. 143 of 2004 at Kisumu over Kisumu Municipality/Block 3/92 do apply to what the learned judge herein found of Kisumu Municipality/Block 12/265.

28. Regarding the complaint regarding limitation, after reviewing the evidence before the learned Judge, our considered view is that the dispute herein began with the appellant's failure to repay the credit facility that had been advanced to it, and which facility it had utilised. The agreement was that it is advanced the facility, and it repays. The facility was secured by the charge on the two parcels of land. The arrangement was that in the event that it failed to service the facility, the 1st respondent would sell the parcels to recover its money. The parcels were just a collateral. There was no agreement between the parties regarding the purchase or sale of land. It was a loan agreement. This is what the learned Judge found in the impugned decision. As we understand it the appellant's grievance was the manner in which the 1st respondent exercised its statutory power of sale but as the statutory power of sale was saved in the charge and the loan agreement, then the appellant was, in substance, alleging a breach of contract. Under section 4 of the *Limitation of Actions Act*, any dispute regarding this loan contract had to be brought within six (6) years. The learned Judge correctly found that the appellant's claim was filed outside the period allowed, and therefore was statute-barred. This is counting from 2002 when the 2nd respondent bought the two parcels in a public auction.

29. We hope we have said enough to show that, this appeal has no merits. It is dismissed with costs.

DATED AND DELIVERED AT KISUMU THIS 9TH DAY OF JUNE 2023.

P.O. KIAGE

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

A. O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR